Supreme Court, U.S.
FILED
021572 APR 23 2003
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Supreme Court of the United States

DONALD RAPIER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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75 pp

QUESTIONS PRESENTED FOR REVIEW

1.) Whether the Court can ascertain that Petitioner Rapier's plea of guilty to violations of 18 U.S.C. §§ 2252A(a)(l), 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 2256 was a voluntary and intelligent choice among the alternative courses of action open to the defendant where: (1) the plea was effected prior to this Court's decision in *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002 U.S. LEXIS 2789 (4-16-02); (2) the indictment specifically quoted the portions of 18 U.S.C. § 2256(8) found unconstitutional in *Ashcroft*; (3) the adjective "actual" was never used during the plea colloquy much less used to modify or restrict the general terms "minors" or "children"; and (4) the District Court stated on the record that it was "Bothered" by the plea colloquy?

2.) Whether, in light of petitioner's challenge to the knowing and voluntary nature of his plea, the ambiguity of the plea colloquy, and the change in the law effected by this Court's *Ashcroft* decision subsequent to petitioner's plea, this Court should remand Petitioner Rapier's case to allow him the opportunity to demonstrate "actual innocence" of the charges?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit.

More specifically, the Petitioner Donald Rapier and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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OPINIONS BELOW

Donald Rapier, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on 3-17-03.

The 3-17-03 opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision, and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Southern District Of Texas, entered on 6-6-00, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment of the United States Court of Appeals for the Fifth Circuit in the direct appeal in this case, entered on 1-24-02, is an unpublished decision, and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment of the United States Supreme Court, granting certiorari, vacating the judgment of the Court of Appeals, and remanding for further consideration in light of *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002), was entered on 10-7-02, is reported at 123 S. Ct. 69; 154 L. Ed. 2d 2; 2002 U.S. LEXIS 5396, and is reprinted in the separate Appendix D to this Petition.

The docket sheets for the United States District Court for the Southern District Of Texas are reprinted in the separate Appendix E to this Petition.

The docket sheets for the United States Court of Appeals for the Fifth Circuit are reprinted in the separate Appendix F to this Petition.

The indictment in this case, quoting the provisions found unconstitutional by this Court in *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002

U.S. LEXIS 2789 (4-16-02), is reprinted in the separate Appendix G to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 3-17-03. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law ... abridging the freedom of speech ... *Id.*

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... *Id.*

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Id.*

18 U.S.C. § 2252A provides:

§ 2252A. Certain activities relating to material constituting or containing child pornography

(a) Any person who--

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes--

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(3) knowingly reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer;

(4) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced

using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(5) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer,

shall be punished as provided in subsection (b).

(b) (1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), (3), or (4) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction under this chapter, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., 2241 et seq., or

2421 et seq.], or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 5 years, or both, but, if such person has a prior conviction under this chapter, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., 2241 et seq., or 2421 et seq.], or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

(c) It shall be an affirmative defense to a charge of violating paragraphs (1), (2), (3), or (4) of subsection (a) that--

(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;

(2) each such person was an adult at the time the material was produced; and

(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression

that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

(d) Affirmative defense. It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant--

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof--

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

HISTORY:

(Added Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(a) [Title I, § 121(subsec. 3(a)], 110 Stat. 3009-28; Oct 30, 1998, P.L. 105-314, Title II, §§ 202(b), 203(b), 112 Stat. 2978.). *Id.*

18 U.S.C. § 2256 provides:

§ 2256. Definitions for chapter

For the purposes of this chapter [18 USCS §§ 2251 et seq.], the term--

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated--

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal,

whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;

(6) "computer" has the meaning given that term in section 1030 of this title;

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct; and

(9) "identifiable minor"--

(A) means a person--

(i)

(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

HISTORY:

(Added Feb. 6, 1978, P.L. 95-225, § 2(a), 92 Stat. 8; May 21, 1984, P.L. 98-292, § 5, 98 Stat. 205; Oct. 18, 1986, P.L. 99-500, Title I, § 101(b), 100 Stat. 1783-74; Oct. 30, 1986, P.L. 99-591, Title I, § 101(b), 100 Stat. 3341-74; Nov. 7, 1986, P.L. 99-628, § 4, 100 Stat. 3510; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle N, Ch 1, §§ 7511(c), 7512(b), 102 Stat. 4485, 4486.)

(As amended Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(a) [Title I, § 121(subsec. 2)], 110 Stat. 3009-27.). *Id.*

STATEMENT OF THE CASE

Donald Rapier was charged with violation of 18 U.S.C. § 2252A(a)(1) and 18 U.S.C. § 2256 (Interstate or foreign transportation of child pornography) (Count 1); 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 2256 (Possession of child pornography) (Count 2).

These charges arose from the "recovery" of 17 images from Petitioner Rapier's laptop computer when he was returning from a trip outside the United States. The images had been deleted and, prior to deletion, had been "computer generated" images which had not been made utilizing actual children.

The indictment specifically invoked and quoted the definitions of 18 U.S.C. § 2256 which criminalize material that "appears to be of a minor" and/or "conveys the impression" that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct which this Court held unconstitutional in *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002 U.S. LEXIS 2789 (4-16-02). (Appendix G, Exhibits G2-G3)

On 3-6-00, Mr. Rapier pleaded guilty to the indictment without a plea agreement. During the colloquy for the plea, the District Court asked Mr. Rapier if he had "read the indictment", to which Mr. Rapier responded that he had. While, during the court's statement of the elements of the offenses to Mr. Rapier, the court used the term "minor" the court did not at any time during the colloquy limit the term "minor" to the constitutional portions of 18 U.S.C. § 2256 through the use of the adjective "actual". (CR 13)[1] (Transcript of Rearraignment and Plea 3-6-00)

While Mr. Rapier acquiesced during questioning that the images involved "showed kids engaging in sex, one or more children engaging in sex", neither the court, nor

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[1] This refers to the district court docket or "Clerk's Record", entry #13)

prosecutor, nor defense counsel, nor Mr. Rapier ever stated that the images were of "actual", as opposed to "virtual" persons. In fact, the term "actual"[2] does *not* appear at any place during the entire transcript of the change of plea hearing. And for good reason. At the time of the change of plea proceedings, as explicitly stated in the indictment, an image of a "virtual" individual was legally indistinguishable from an image of an "actual" individual. They were both illegal. (CR 13) (Transcript of Rearraignment and Plea 3-6-00)

The record fails to indicate that either the District Court or counsel ever advised Mr. Rapier that portions of the indictment, ***elements*** of the charged offenses, were unconstitutional and could not be used to find him guilty in a trial of the case. Certainly, there is no indication that anyone ever advised Mr. Rapier that an image of a "minor" was only an element of the offense if the minor was "actual" as opposed to "virtual". As far as the record reveals, the only advice that Mr. Rapier received in this regard was erroneous: the indictment indicated that images, whether virtual or actual minors or children or kids were all the same -- illegal.

While the District Court accepted the plea of guilty, careful examination of the plea colloquy demonstrates that Mr. Rapier was so confused during the colloquy that the Court stated it was "bothered" by the application of the facts to the "elements" quoted by the government attorney. (Transcript 3-6-00, page 23)

On 5-26-00, Mr. Rapier was sentenced to serve 60 months incarceration plus 3 years supervised release. This sentence represented the statutory mandatory minimum after enhancement under 18 U.S.C. § 2252A(b)(1), for a 14 year old State of Texas deferred adjudication. (Appendix B)

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[2] In light of this fact, the Court of Appeals' finding on remand from this Court, that Mr. Rapier "pleaded guilty to offenses involving visual depictions of ***actual*** minors", is clearly erroneous. (Appendix A, page 3)

Counsel filed a direct appeal. On appeal, counsel argued:

> ISSUE NUMBER ONE: The District Court erred when it failed to admonish Appellant of both the maximum and minimum penalties that he was exposed to as a result of his guilty plea.
>
> ISSUE NUMBER TWO: The District Court erred when it failed to uphold Appellant's objection to the inclusion of a 14 year old State of Texas charge that had been successfully adjudicated through deferred prosecution.
>
> ISSUE NUMBER THREE: The District Court erred when, after failing to admonish Appellant of the minimum and maximum sentences he was exposed to, instructed Appellant to register as a sex-offender with the State of Texas and ordered the Appellant to attend a sexual offenders group run by the Baylor College of Medicine in Houston, Texas. Thus incriminating Appellant to the point where any plea withdrawal and remand for jury trial would have been fruitless.

(USCA 5 Docket, Entry 9-6-01, page 6)

The Court of Appeals denied his appeal on 1-24-02.

On 4-16-02, this Court decided *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002 U.S. LEXIS 2789 (4-16-02), where the Court held that the definitions of 18 U.S.C. § 2256 which criminalize material that "appears to be of a minor" and/or "conveys the impression" that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct, were unconstitutional.

Mr. Rapier filed a Petition for Writ of Certiorari with this Court in which he argued, *inter alia*, that the Court should vacate and remand his case in light of *Ashcroft*

because the plea colloquy failed to establish a factual basis for the conviction. The government conceded that the Court should vacate and remand and, on 10-7-02, the Court did grant certiorari, vacate the judgment of the Fifth Circuit, and remand for further consideration in light of *Ashcroft*. See *Rapier v. United States*, 123 S. Ct. 69; 154 L. Ed. 2d 2; 2002 U.S. LEXIS 5396 (10-7-02).

On remand to the Fifth Circuit, the government changed course and argued that Mr. Rapier's plea was valid because (1) the plea colloquy established a *factual basis*, and (2) the District Court only recited the constitutional provisions of 18 U.S.C. § 2256 when that court explained the elements of the offense to Mr. Rapier during the plea colloquy.

On 3-17-03, the Court of Appeals again affirmed the District Court judgment with the following holding:

> Following remand, the parties were directed to address the effect, if any, of *Free Speech Coalition* and whether the matter should be remanded to the district court for further proceedings. We do not regard the Supreme Court's remand for reconsideration as invalidating the conviction and sentence. See *United States v. Slanina*, 313 F.3d 891, 892 (5th Cir. 2002). Because *Free Speech Coalition* does not affect the viability of Rapier's guilty plea, we AFFIRM for the reasons expressed in our original opinion, with the following additional explanation:
>
> In *Free Speech Coalition*, 535 U.S. at 254-58, the Court determined that, because the provisions of 18 U.S.C. § 2256(8)(B) and (D), which define "child pornography," extend to visual depictions that do not involve actual minors, and thus prohibit the freedom to engage in a substantial amount of lawful speech, they are overbroad and

> unconstitutional. The Court noted that the definition found in § 2256(8)(A) prohibits pornographic images made using actual minors, a prohibition acceptable under *United States v. Ferber*, 458 U.S. 747 (1982). See *Free Speech Coalition*, 535 U.S. at 241.
>
> At Rapier's rearraignment, the district court employed only the definition provided by § 2256(8)(A). This provision was unaffected by the decision in *Free Speech Coalition*, and it remains viable. See *United States v. Paul*, 274 F.3d 155, 160-61 (5th Cir. 2001), *cert. denied*, 535 U.S. 1022 (2002); *United States v. Reedy*, 304 F.3d 358, 364 n.3 (5th Cir. 2002); *United States v. Kelly*, 314 F.3d 908, 911-913 (7th Cir. 2003). Because Rapier pleaded guilty to offenses involving visual depictions of actual[3] minors, *Free Speech Coalition* does not affect the validity of his convictions. Although Rapier's indictment also contained the definitions struck down by *Free Speech Coalition*, these definitions were independent of, and unnecessary to, the offenses of which he pleaded guilty and thus are not fatal to his convictions. See *United States v. Nunez*, 180 F.3d 227, 233 (5th Cir. 1999).
>
> The issues raised by Rapier on direct appeal are unaffected by *Free Speech Coalition*. The judgment is AFFIRMED.

Mr. Rapier demonstrates within that the United States court of appeals for the Fifth Circuit has decided a federal question in a way that conflicts with applicable decisions of

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[3] As set forth above, the adjective "actual" does not appear in the entire transcript of the change of plea proceedings. The term was never used.

this Court. In light of the extensive factual confusion in the plea colloquy and the legal confusion the *Ashcroft* decision has added, it simply cannot be said that the record before the District Court, the Court of Appeals or this Court demonstrates that Mr. Rapier's plea of guilty was a knowing and voluntary act. Moreover, the Court of Appeals' holding that Mr. Rapier somehow "pleaded guilty to offenses involving visual depictions of actual minors" is clearly erroneous.

REASONS FOR GRANTING THE WRIT

1.) THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > **(c)** a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court... *Id.*

Supreme Court Rule 10(c).

1A.) Petitioner Rapier's Plea Of Guilty To Violations Of 18 U.S.C. §§ 2252A(A)(L), 18 U.S.C. § 2252A(A)(5)(B) And 18 U.S.C. § 2256 Was Not A Voluntary And Intelligent Choice Among The Alternative Courses Of Action Open To The Defendant Where: (1) The Plea Was Effected Prior To This Court's Decision In *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002 U.S. LEXIS 2789 (4-16-02); (2) The Indictment Specifically Quoted And Incorporated By Reference The Portions Of 18 U.S.C. § 2256(8) Found Unconstitutional In *Ashcroft*; (3) The Adjective "Actual" Was Never Used During The Plea Colloquy Much Less Used To Modify Or Restrict The General Terms "Minors" Or "Children"; And (4) The District Court Stated On The Record That It Was "Bothered" By The Plea Colloquy.

In *Bousley v. United States*, 523 U.S. 614, 618-619, 140 L. Ed. 2d 828, 837-838, 118 S. Ct. 1604 (1998), this Court pointed out:

> A plea of guilty is constitutionally valid only to the extent it is "voluntary" and "intelligent." *Brady v. United States*, 397 U.S. 742, 748, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970). We have long held that a plea does not qualify as intelligent unless a criminal defendant first receives "real notice of the true

> nature of the charge against him, the first and most universally recognized requirement of due process." *Smith v. O'Grady*, 312 U.S. 329, 334, 85 L. Ed. 859, 61 S. Ct. 572 (1941).

Bousley v. United States, 118 S. Ct. at 1609.

In *Bousley*, the defendant pleaded guilty to "use" of a firearm in violation of 18 U.S.C. § 924(c)(1). He subsequently challenged his plea to the violation in a motion pursuant to 28 U.S.C. § 2255. This motion was denied by the District Court and Bousley filed an appeal. While Bousley's appeal was pending, this Court, in *Bailey v United States,* 516 US 137, 133 L Ed 2d 472, 116 S Ct 501 (1995), narrowed the definition of the term "use" as an element of violation of 18 U.S.C. § 924(c). The Court held in that an 18 U.S.C. § 924(c)(1) conviction for "use" of a firearm required the government to show active employment of the firearm. Bousley then argued that his conviction under 18 U.S.C. § 924(c)(1) ought to be vacated, on the theory that (1) the *Bailey* decision ought to be applied to the case at hand; (2) his guilty plea to the 924(c)(1) charge had been "involuntary", since he had been misinformed by the District Court as to the nature of the charged crime; and (3) that this claim had not been waived by the guilty plea. Nevertheless, the Court of Appeals affirmed the dismissal.

On certiorari, this Court reversed and remanded. The Court pointed out:

> Amicus contends that petitioner's plea was intelligently made because, prior to pleading guilty, he was provided with a copy of his indictment, which charged him with "using" a firearm. Such circumstances, standing alone, give rise to a presumption that the defendant was informed of the nature of the charge against him. *Henderson v. Morgan*, 426 U.S. 637, 647, 49 L. Ed. 2d 108, 96 S. Ct. 2253 (1976); *id.*, at 650 (White, J., concurring). Petitioner nonetheless maintains

that his guilty plea was unintelligent because the District Court subsequently misinformed him as to the elements of a § 924(c)(1) offense. *In other words, petitioner contends that the record reveals that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged. Were this contention proven, petitioner's plea would be, contrary to the view expressed by the Court of Appeals, constitutionally invalid.*

Our decisions in *Brady v. United States*, supra, *McMann v. Richardson*, 397 U.S. 759, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970), and *Parker v. North Carolina*, 397 U.S. 790, 25 L. Ed. 2d 785, 90 S. Ct. 1458 (1970), relied upon by amicus, are not to the contrary. Each of those cases involved a criminal defendant who pleaded guilty after being correctly informed as to the essential nature of the charge against him. See *Brady*, 397 U.S. at 756; *McMann*, 397 U.S. at 767; *Parker*, 397 U.S. at 792. Those defendants later attempted to challenge their guilty pleas when it became evident that they had misjudged the strength of the Government's case or the penalties to which they were subject. For example, Brady, who pleaded guilty to kidnapping, maintained that his plea was neither voluntary nor intelligent because it was induced by a death penalty provision later held unconstitutional. 397 U.S. at 744. We rejected Brady's voluntariness argument, explaining that a "plea of guilty entered by one fully aware of the direct consequences" of the plea is voluntary in a constitutional sense "unless induced by threats . . . ,

> misrepresentation . . . , or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business." *Id.*, at 755 (internal quotation marks omitted). We further held that Brady's plea was intelligent because, although later judicial decisions indicated that at the time of his plea he "did not correctly assess every relevant factor entering into his decision," *id.*, at 757, he was advised by competent counsel, was in control of his mental faculties, and "was made aware of the nature of the charge against him," *id.*, at 756. In this case, by contrast, petitioner asserts that he was misinformed as to the true nature of the charge against him.

Bousley, supra, 118 S. Ct. at 1609. (emphasis added)

In Mr. Rapier's case, as set forth in the statement of facts, he pleaded guilty to violation of 18 U.S.C. § 2252A(a)(1) and 18 U.S.C. § 2256 (Interstate or foreign transportation of child pornography) (Count 1); 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 2256 (Possession of child pornography) (Count 2).

The indictment specifically invoked and quoted the definitions of 18 U.S.C. § 2256 which criminalize material that "appears to be of a minor" and/or "conveys the impression" that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct which this Court held unconstitutional in *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002 U.S. LEXIS 2789 (4-16-02). (Appendix G, Exhibits G2-G3)

Subsequent to his plea, while he was on direct appeal, this Court handed down its decision in *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002 U.S. LEXIS 2789 (4-16-02), where the Court narrowed the definition of "child pornography" as set forth in 18 U.S.C. § 2256, just as the Court had narrowed the definition of "use" in *Bailey*.

Since Mr. Rapier's direct appeal had been just been denied, he timely filed a Petition for Writ of Certiorari with this Court in which he argued, *inter alia*, that the Court should vacate and remand his case in light of *Ashcroft* because the plea colloquy failed to establish a factual basis for the conviction. The government conceded that the Court should vacate and remand and, on 10-7-02, the Court did grant certiorari, vacate the judgment of the Fifth Circuit, and remand for further consideration in light of *Ashcroft*. See *Rapier v. United States*, 123 S. Ct. 69; 154 L. Ed. 2d 2; 2002 U.S. LEXIS 5396 (10-7-02).

On remand, Mr. Rapier argued to the Court of Appeals that his plea was both lacking a factual basis ***and*** involuntary, due to the narrowing of the definition of "child pornography" by this Court subsequent to his plea. While the Court of Appeals rejected this argument, the lower court's decision is contrary to and irreconcilable with this Court's decision in *Bousley* and with the cases cited by this Court in its *Bousley* decision. There is simply *no way* that one can look at the plea colloquy in Mr. Rapier's case and say that, in light of this Court's narrowing of the definition of "child pornography" in *Ashcroft*, Mr. Rapier *was* informed "as to the true nature of the charge against him". [4]

This Court's narrowing of the definition of the term "child pornography" in *Ashcroft* rendered Mr. Rapier's plea precisely as "involuntary" as this Court's narrowing of the

---

[4] Moreover, as set forth above, the rationale of the Court of Appeals is flawed in another way. That court held that Mr. Rapier pleaded guilty to child pornography involving "actual" children or minors. This holding is clearly erroneous. The term "actual" doesn't even appear in the transcript of the change of plea. This provides an alternative reason for this Court to vacate and remand to the lower court.

term "use" in *Bailey* rendered Bousley's plea involuntary. The cases are constitutionally indistinguishable. [5]

Based on the foregoing facts and law, the Court of Appeals has decided a federal question in a way that conflicts with the decisions of this Court.

[5] Analogous cases decided by the lower courts subsequent to this Court's *Ashcroft* decision support Mr. Rapier's argument that his plea was *not* knowing and voluntary in light of the narrowing of the definition of "child pornography" effected by the *Ashcroft* decision. See *United States v. Morgan*, 2002 U.S. Dist. LEXIS 8909 (D ME 5-10-02) (allowing defendant to withdraw plea in light of change in the law effected by *Ashcroft*); *United States v. Reilly*, 2002 U.S. Dist. LEXIS 19564 (SD NY 10-15-02) (same).

1B.) In Light Of (1) Petitioner's Challenge To The Knowing And Voluntary Nature Of His Plea, (2) The Ambiguity Of The Plea Colloquy, And (3) The Change In The Law Effected By This Court's *Ashcroft* Decision Subsequent To Petitioner's Plea, This Court Should Remand Petitioner Rapier's Case To Allow Him The Opportunity To Demonstrate "Actual Innocence" Of The Charges.

As set forth above, Mr. Rapier's plea of guilty was rendered involuntary within the meaning of the term as construed in *Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998), by this Court's narrowing of the definition of the definition of "child pornography" in the Court's decision in *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 152 L. Ed. 2d 403; 2002 U.S. LEXIS 2789 (4-16-02).

In *Bousley*, this Court held that the defendant should be entitled to demonstrate "actual innocence" to the District Court in support of his claim of an unconstitutional plea.

While *Bousley* was decided as an appeal from the denial of a motion pursuant to 28 U.S.C. § 2255 and Mr. Rapier's challenge to his plea of guilty is still on direct appeal, there is no reason why Mr. Rapier should not be entitled to the same opportunity; the opportunity to prove his innocence of the charges. This is especially true in this case because "[b]eing legally innocent of a crime is a fair and just reason to withdraw a guilty plea." *United States v. Gomez-Orozco*, 188 F.3d 422; 1999 U.S. App. LEXIS 18413 (7th Cir. 1999) (citing *United States v. Groll*, 992 F.2d 755, 758 (7th Cir. 1993)). Mr. Rapier should be allowed the opportunity to demonstrate his innocence.

CONCLUSION

In light of the extensive factual confusion in the plea colloquy and the legal confusion the *Ashcroft* decision has added, it simply cannot be said that the record before this Court demonstrates that Mr. Rapier's plea of guilty was a knowing and voluntary act. He should be entitled to the same relief this Court granted in *Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998); remand to allow him to demonstrate his innocence.

For all of the foregoing reasons, Petitioner Donald Rapier respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming his direct appeal and **REMAND**[6] to the court of appeals for reconsideration in light of *Bousley v. United States*, 523 U.S. 614, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998).

DONALD RAPIER
88096-079
P.O. Box 7000
Texarkana, TX 75505

Date: _____

[6] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).

No.

Supreme Court of the United States

DONALD RAPIER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

COMES NOW PETITIONER Donald Rapier and submits the attached appendix pursuant to Supreme Court Rules.

DONALD RAPIER
88096-079
P.O. Box 7000
Texarkana, TX 75505

Date:_____

APPENDIX A

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED 3-17-03

U.S. COURT OF APPEALS
FILED
MAR 17 2003
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20514
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DONALD DEE RAPIER,
also known as Donald D. Rapier,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-00-CR-76-ALL

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Donald Rapier was convicted, following guilty pleas, of one count of foreign or interstate transportation of child pornography

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent

except under the limited circumstances set forth in STH CIR. R. 47.5.4.

---

and one count of possession of child pornography. This court affirmed. See *United States v. Rapier*, No. 00-20514 (Jan. 24, 2002) (unpublished), vacated, 123 S. Ct. 69 (2002). The Supreme Court vacated and remanded for reconsideration in light of *Ashcroft v. Free Speech coalition*, 535 U.S. 234 (2002).

Following remand, the parties were directed to address the effect, if any, of Free Speech Coalition and whether the matter should be remanded to the district court for further proceedings. We do not regard the Supreme Court's remand for reconsideration as invalidating the conviction and sentence. See *United States v. Slanina*, 313 F.3d 891, 892 (5th Cir. 2002). Because *Free Speech Coalition* does not affect the viability of Rapier's guilty plea, we AFFIRM for the reasons expressed in our original opinion, with the following additional explanation:

In *Free Speech Coalition*, 535 U.S. at 254-58, the Court determined that, because the provisions of 18 U.S.C. § 2256(8)(B) and (D) , which define "child pornography," extend to visual depictions that do not involve actual minors, and thus prohibit the freedom to engage in a substantial amount of lawful speech, they are overbroad and unconstitutional. The Court noted that the definition found in § 2256(8) (A) prohibits pornographic images made using actual minors, a prohibition acceptable under *United States v. Ferber*, 458 U.S. 747 (1982). See *Free Speech coalition*, 535 U.S. at 241.

At Rapier's rearraignment, the district court employed only the definition provided by § 2256(8) (A) This provision was unaffected by the decision in *Free Speech Coalition*, and it remains

viable. See *United States v. Paul*, *274* F.3d 155, 160-61 (5th Cir. 2001), *cert. denied*, 535 U.S. 1022 (2002); *United States v. Reed*, 304 F. 3d 358, 364 n.3 (5th Cir. 2002); *United States v. Kelly*, 314 F.3d 908, 911-913 (7th Cir. 2003). Because Rapier pleaded guilty to offenses involving visual depictions of actual minors, *Free Speech Coalition* does not affect the validity of his convictions. Although Rapier's indictment also contained the definitions struck down by *Free Speech Coalition*, these definitions were independent of, and unnecessary to, the offenses of which he pleaded guilty and thus are not fatal to his convictions. See *United States v. Nunez*, 180 F.3d 227, 233 (5th Cir. 1999).

The issues raised by Rapier on direct appeal are unaffected by *Free Speech Coalition*. The judgment is AFFIRMED.

APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED 6-6-00

ENTERED JUNE 06, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Holding Session in Houston
JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA,
v.
DONALD DEE RAPIER

[] See Additional Aliases Sheet

Case Number: 4:00CR00076-001
Defendant's Attorney: Jay T. Karahan

THE DEFENDANT:
[x] pleaded guilty to count(s) 1 and 2 on March 6,2000.

[] pleaded nolo contendere to count(s)_____ which was accepted by the court.
[] was found guilty on count(s)_____ after a plea of not guilty.

Title & Section: 18 U.S.C. §2252A(a)(1) and §2256
Nature of Offense: interstate or foreign transportation of child pornography
Date Offense Concluded: 07/04/1999
Count Number(s): 1
Title & Section: 18 U.S.C. §2252A(a)(5)(B) and §2256
Nature of Offense: Possession of child pornography
Date Offense Concluded: 07/04/1999
Count Number(s): 2

[] See Additional Counts of Conviction Sheet

The defendant is sentenced as provided in pages 2 through 6 of this judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on count(s)_____

[] Count(s)_____dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid

Defendant's Social Security No.: 440-44-5345
Defendant's Date of Birth: 02/22/1946
Date of imposition of Judgement: May 26, 2000
Defendant's USM No.: 88096-079
Defendant's Residence Address: 8787 Woodway, #1305, Houston, TX 77063.
Defendant's Mailing Address: 8787 Woodway, #1305, Houston, TX 77063.

Signature of Judicial Officer
/SS/_____.
Name and Title of Judicial Officer:
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE
Date: June 2, 2000

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 60 month(s).

The term consists of SIXTY (60) MONTHS on each of Counts 1 and 2 to run concurrently.

[] See Additional Imprisonment Terms Sheet
[x] The Court makes the following recommendations to the Bureau of Prisons: That the defendant be incarcerated at the federal institution located at Burner, North Carolina.
[] The defendant is remanded to the custody of the United States Marshal.
[] The defendant shall surrender to the United States Marshal for this district

[] _____ on _____
[] as notified by the United States Marshal.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[] by2 p.m. on _____
[x] as notified by the United States Marshal.
[] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATESMARSHAL

By

_____
Deputy U S Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).
The term consists of THREE (3) YEARS as to each of Counts 1 and 2, to run concurrently.
[] See Additional Supervised Release Terms Sheet
The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.
For offenses committed on or after September 13, 1994:
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.
[] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)
[x] The defendant shall not possess a firearm as defined in 18 U.S.C.§ 921. (Check, if applicable)
If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF SUPERVISION
[x] See Special Conditions of Supervision Sheet 3.01

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;
2) the defendant shah report to the probation officer and shall submit a truthful and complete wrr['ten report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change m residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a taw enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or

characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;
14) if restitution has been ordered, the defendant shall make restitution as ordered by the Court and in accordance with the applicable provisions of Title 18 U S.C. § 2248, 2259 2264. 2327. 3663 3663A, and/or 3664 The defendant shall also pay the assessment imposed m accordance with Title 18 US.C. § 3013;
15) the defendant shall notify the U.S. Probation Office of any maternal change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

The defendant is required to provide the probation officer access to any requested financial information. If a fine or restitution amount has been imposed, the defendant is prohibited from Incurring new credit charges or opening additional lines of credit without approval of the probation officer, unless the defendant is in compliance with the fine or restitution payment schedule.

The defendant is required to participate in a mental health program as deemed necessary and approved, by the probation officer. The defendant will incur costs associated with such programs, based on ability to pay as determined by the probation officer.

The defendant shall register with the sex offender registration agency in any state where the defendant resides, is employed, carries on a vocation, or is a student, as directed by the probation officer. The probation officer will provide the state officials with any and all information required by the state sex offender registration agency and may direct the defendant to report to that agency personally for additional processing, such as photographing and fingerprinting.

The defendant shall not possess a computer or obtain access to any computer system outside of that required for employment. Should he have access to a computer for employment, he is prohibited from accessing or using the Internet during his term of supervision. If the defendant requires the use of the Internet, the probation officer to assess request for Internet usage. Also, the defendant shall grant to the probation officer access to any computer used by the defendant to ensure compliance with the conditions of his supervision.

The defendant shall not possess any type of pornography unless approved by a physician.

The defendant Js required to participate in a sex offender treatment program as deemed necessary and approved by the probation officer. The defendant will incur costs associated with such program, based upon ability to pay as determined by the probation officer.

The defendant shall not have contact with children less than 18 years of age without adult supervision.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5. Part B.

Assessment: $200.00
Fine: $6,000.00
Restitution:

A $100 special assessment is ordered for each count, for a total of $200.

[] if applicable, restitution amount ordered pursuant to plea agreement.

[] See Additional Terms for Criminal Monetary Penalties Sheet.

FINE

[] The above fine includes costs of incarceration and/or supervision in the amount of $0.00 .

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612 (f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612 (g).

[] The Court determined that the defendant does not have the ability to pay interest and it is ordered that.

[] The interest requirement is waived

[] The interest requirement is modified as follows

RESTITUTION

[] The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals: $0.00		$0.00	

[] See Additional Victims

SCHEDULE OF PAYMENTS

Payments shall be applied ;n the following order: (1) assessment: (2) restitution: (3) fine principal: (4) cost of 3secution: (5) interest: (6) penalties.
Payment of total fine and other criminal monetary penalties shall be due as follows:
1) [] in full immediately: or
2) [x] $6,200.00 immediately, balance due (in accordance with C, D, or E); or
3) [] not later than _____; or
4) [] in installments to commence 30 day(s) after the date of this judgment.

In the event the entire amount of criminal monetary penalties imposed is not

paid prior to the commencement of supervision, the U.S. probation officer

shall pursue collection of the amount due, and shall request the court to

establish a payment schedule if appropriate; or
5) [] in _____ (e.g. equal, weekly, monthly, quarterly) installments of ____

over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.
Special instructions regarding the payment of criminal monetary penalties:
Make all payments payable to: U.S. District Clerk, Attn: Finance, P.O. Box 61010, Houston, TX 77208.
[] Joint and Several
[] See Additional Joint $ Several Defendants
[] The defendant shall pay the cost of prosecution.
[] The defendant shall pay the following court cost(s):
[] The defendant shall forfeit the defendant's interest in the following property to the United States:
[] See Additional Forfeited Property Sheet

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program, are to be made as directed by the Court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

[x] The Court adopts the factual findings and guideline application in the presentence report.

OR

[]The Court adopts the factual findings and guideline application in the presentence report except:

[] See Additional Findings and Guideline Application Exceptions Sheet

Guideline Range Determined by the Court:

Total Offense Level: 18

Criminal History Category: 1

Imprisonment Range: 27 to 33 months.

Supervised Release Range: 3 to 5 years.

Fine Range: $6,000.00 to $60,000.00

[] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: _____

[] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 1DgA, 110, 110A, 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment

of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of

[] Partial or no restitution is ordered for the following reason(s):

[] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines

OR

[] The sentence is within the guideline, range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

[] See Additional Reasons for Point Within Range Sheet

OR

[x] The sentence departs from the guideline range:

[] upon motion of the government, as a result of defendant's substantial assistance.

[x] for the following specific reason(s):

Due to enhancement provisions pursuant to 18 USC. § 2252A(b)(1) and (b)(2).

[] See Additional Reasons for Departure From The Guideline Range Sheet

APPENDIX C

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED 1-24-02

2002 U.S. App. LEXIS 3816, *

USA v. Rapier

00-20514

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2002 U.S. App. LEXIS 3816

January 24, 2002, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: United States District Court for the Southern District of Texas. H-00-CR-76-ALL.

OPINION: Affirmed

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT U. S. COURT OF APPEALS
FILED JAN 24 2002
CHARLES R. FULDRUGE CLERK
No. 00 20514
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff Appellee, versus DONALD DEE RAPIER,

Defendant Appellant.

Appeal from the United States District Court for the Southern District of Texas USDC No. H 00 CR 76 ALL Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges. PER CURIAM:*

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Donald Dee Rapier appeals from his guilty plea conviction and sentence on one count of foreign or interstate transportation of child pornography and one count of possession of child pornography. Rapier first complains that the district court erred at his re arraignment by failing to admonish him that he faced a mandatory minimum sentence of imprisonment under 18 U.S.C. § 2252A(b) as a result of his prior conviction for indecency with a child under Texas state law. The district judge did err. However, prior to imposing sentence the district judge put Rapier on notice of the mandatory minimum sentence and gave Rapier the opportunity to withdraw his guilty plea. Rapier declined to do so. Because the district court complied with FED. R. CRIM. P. 11 prior to entering judgment and coupled its compliance

with provision of an opportunity to withdraw the guilty plea, the error made at re arraignment was rendered harmless. See *United States v. Johnson*, 1 F.3d 296, 303 04 (5th Cir. 1993) (en banc) (error was harmless where failure of judge to advise defendant of his mandatory minimum sentence could not have affected decision to plead guilty); see also *United States v. Gulledge*, 491 F.2d 679, 679 (5th Cir. 1974) (where district court failed to make a full determination of the factual basis prior to accepting guilty pleas, there was no reversible error where, prior to entering judgment, court complied with FED. R. CRIM. P. 11 and gave defendants an opportunity to withdraw their pleas).

Rapier next argues that his Texas sexual offense, which was disposed of through deferred adjudication, is not a "prior conviction" within the meaning of the enhancement provision. Rapier's argument fails under *United States v. Cisneros*, 112 F.3d 1272, 1280 82 (5th Cir. 1997) (defendant's Texas guilty plea that resulted in a deferred adjudication was a "prior conviction" for purposes of sentence enhancement provision).

Rapier next argues that after failing to admonish him of the minimum and maximum sentences to which he was exposed, the district court compromised his ability to later withdraw his guilty plea by ordering him to register as a sex offender with the State of Texas and to participate in a course for sexual offenders. The record does not reveal that the district court ordered either of these actions. Giving Rapier's pro se brief liberal construction, Rapier contends that he was obliged to take these actions following the entry of a guilty plea at his re arraignment in reliance on the district judge's incorrect admonishment. However, the record shows that Rapier's participation in a course for sexual offenders pre dated his guilty plea, and given evidentiary rules precluding the admission of evidence of a withdrawn plea of guilty, see FED. R. Evid. 410; FED. R. CRIM. P. 11 (e) (6) , Rapier

cannot demonstrate that his ability to withdraw his guilty plea and proceed to trial was compromised due to error below.

Rapier also argues that the Government provided inadequate notice of its intention to seek enhancement of his sentence prior to entry of his original guilty plea. There is no statutory provision mandating that the Government give notice of its intention to seek an enhanced sentence under 18 U.S.C. 9 2252A(b). Further, in crimes involving the sexual exploitation of children, this court is bound to enforce a mandatory minimum sentence prescribed for a second conviction, even where the Government does not seek the enhanced penalty. See *United States v. Schmeltzer,* 960 F.2d 405, 408 09 (5th Cir. 1992) (vacating sentence as inconsistent with the minimum sentence prescribed for a second conviction under 18 U.S.C. § 2252(a)(2),(b)(2)).

Rapier also complains that he received ineffective assistance of counsel. This court does not review ineffective assistance of counsel claims on direct appeal except in the rare case where the record permits a fair evaluation of the merits of the claim. See *United States v. Crooks*, 83 F.3d 103, 1o8 (5th Cir. 1996). Rapier's ineffective assistance of counsel claims were not presented to the district court. The record is therefore insufficient to permit evaluation of the claim at this time. See *United States v. Navelar*, 963 F.2d 732, 735 (5th Cir. 1992).

The judgment of the district court is AFFIRMED.

APPENDIX D

JUDGMENT OF THE UNITED STATES SUPREME COURT DATED 10-7-02

123 S. Ct. 69; 154 L. Ed. 2d 2, *;
2002 U.S. LEXIS 5396, **; 71 U.S.L.W. 3233

DONALD RAPIER v. UNITED STATES

01-1731

SUPREME COURT OF THE UNITED STATES

123 S. Ct. 69; 154 L. Ed. 2d 2; 2002 U.S. LEXIS 5396; 71 U.S.L.W. 3233; 2002 Cal. Daily Op. Service 10185; 2002 Daily Journal DAR 11699

October 7, 2002, Decided

PRIOR HISTORY: United States v. Rapier, 31 Fed. Appx. 836, 2002 U.S. App. LEXIS 3816 (2002)

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

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APPENDIX E

DOCKET SHEETS
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Docket as of October 2, 2001 7:06 pm Web PACER (v2.3-TXSD)

U.S. District Court
TXS - Southern District of Texas (Houston)

CRIMINAL DOCKET FOR CASE #: 00-CR-76-ALL

USA v. Rapier

Filed: 02/14/00
Dkt# in other court: None

Case Assigned to: Judge Nancy F. Atlas

DONALD DEE RAPIER (1) Jay Ted Karahan
aka [term 05/26/00
Donald D Rapier 713-622-8777 fax
defendant [COR LD NTC ret]
[term 05/26/00]
Kuniansky Karahan
et al
5051 Westheimer
Ste 700
Houston, TX 77056
713-622-8333
Donald Dee Rapier
[term 05/26/00]
8787 Woodway, #1305
Houston, TX 77081

Pending Counts:
18:2252A. F Interstate or foreign transportation of child pornography MAX PENALTY: 15 yrs and/or $250, 000(1)

Disposition
Cnts l&2 60 mos CBOP, to run concurrent 3yrs SRT to run concurrent; $200 SA; Deft. must participate in a mental health program f/sex offenders, Deft. shall not have centact w/children under the age of 18, $6,000 fine on counts 1 & 2 to run concurrent. Court recommends that deft. be placed in the Butner facility.
(1)
Pending Counts:
18:2252A. F Possession of child pornography MAX PENALTY: 5 yrs and/er $250,000
(2)
Disposition
Cnts l&2 60 mos CBOP, to run concurrent 3yrs SRT to run concurrent; $200 SA; Deft. must participate in a mental health program f/sex offenders, Deft. shall not have centact w/children under the age of 18, $6,000 fine on counts 1 & 2 to run concurrent. Court recommends that deft. be placed in the Butner facility.
(2)

Offense Level (opening): 4
Terminated Counts:
NONE
Complaints:
NONE
U. S. Attorneys:
Daniel Rodriguez
713-718-3300
[COR LD NTC]
US Attorneys Office
PO Box 61129
Houston, TX 77208
713-567-9350
U S Marshal - H
FTS n

713-718-4848
[NTC ret]
515 Rusk
10th Floor
Houston, TX 77002
713-718-4800
U S Probation - H
FTS n
INS_prob1
[NTC ret]
515 Rusk
2nd Floor
Houston, TX 77002
713-250-5266
Pretrial Services - H
FTS n
713-250-5666
[NTC ret]
515 Rusk
6th Floor
Houston, TX 77002
713-250-5218

DOCKET PROCEEDINGS

2/14/00 1 INDICTMENT as to Donald Dee Rapier (1) count(s) 1, 2 ,filed. (pg) [Entry date 02/16/00] [Edit date 09/25/01]

2/14/00 2 AO 257 Information Sheet as to Donald Dee Rapier , filed. (pg) [Entry date 02/16/00] [Edit date 09/25/01]

2/14/00 3 ORDER for Issuance of Summons as to Donald Dee Rapier (Signed by Magistrate Judge

Calvin Botley), entered. (pg) [Entry date 02/16/00] [Edit date 09/25/01]

2/14/00 -- SUMMONS issued for Donald Dee Rapier to appear on 2/24/00, 10 a.m. for Initial Appearance First Appearance set for 10:00 2/24/00 for Donald Dee Rapier before Magistrate Judge Calvin Botley (pg) [Entry date 02/16/00] [Edit date 09/25/01]

2/23/00 11 SUMMONS issued 2/14/00 Returned Executed as to Donald Dee Rapier on 2/18/00 filed. (pg) [Entry date 03/06/00] [Edit date 09/25/01]

2/24/00 4 Arraignment as to Donald Dee Rapier held before Magistrate Judge Calvin Botley Ct Reporter: ERO (Defendant informed of rights.) , filed., Plea of Not Guilty: Donald Dee Rapier (1) count(s) 1, 2 App. Rodriguez f/govt and Karahan f/deft. Bond cont'd. (ck) [Entry date 02/28/00] [Edit date 09/25/01]

2/24/00 5 WAIVER of Speedy Trial Limits by Donald Dee Rapier , filed. (ck) [Entry date 02/28/00] [Edit date 09/25/01]

2/24/00 6 SCHEDULING ORDER as to Donald Dee Rapier setting Motion Filing deadline on 3/15/00; Motion Response deadline 3/25/00 Proposed Voir Dire and Jury Charges by 4/14/00; Pretrial Conference for 8:30 4/3/00; Jury Trial for 9:00 4/17/00 before Magistrate Judge Calvin Botley (Signed by Magistrate Judge Calvin Botley), entered. Parties ntfd. ETT: 3 days Waiver of Speedy Trial? YES (ck) [Entry date 02/28/00] [Edit date 09/25/01]

2/24/00 -- Receipt for surrender of Passport as to Donald Dee Rapier Passport # 158258485 U.S. , filed. (pg) [Entry date 03/26/00] [Edit date 09/25/01]

2/25/00 8 MOTION by Donald Dee Rapier to Travel to Troy Michigan from 2/27/00 to 3/3/00, filed. (ck) [Entry date 02/28/00] [Edit date 09/25/01]

2/25/00 9 ORDER granting [8-1] motion to Travel to Troy Michigan from 2/27/00 to 3/3/00 as to Donald Dee Rapier (1) (Signed by Magistrate Judge Calvin Botley entered. Parties ntfd. (ck) [Entry date 02/28/00] [Edit date 09/25/01]

2/28/00 7 NOTICE set Rearraignment for 3:00 3/6/00 for Donald Dee Rapier before Judge Nancy F. Atlas , filed. Parties ntfd. (ck) [Entry date 02/28/00] [Edit date 09/25/01]

2/28/00 10 Surety BOND with Order Setting Conditions of Release entered by Donald Dee Rapier in Amount $ 50,000 with $2,500.00 cash deposit drawn on WElls Fargo Bank, Receipt # 6812008093, filed. (Signed by Magistrate Judge Calvin Botley) Bond Depositor: Ronald Raper, 6435 Ladera Drive, Houston, TX, 77083 (ks) [Entry date 02/29/00] [Edit date 09/25/01]

3/6/00 12 ORDER as to Donald Dee Rapier (Signed by Judge Nancy F. Atlas), entered. Parties ntfd. Deft's second motion to travel outside the District is granted. (pg) [Entry date 03/08/00] [Edit date 09/25/01]

3/6/00 13 Re-Arraignment as to Donald Dee Rapier held before Judge Nancy F. Atlas Ct Reporter: none; filed. Plea of Guilty: Donald Dee Rapier (1) count(s) 1, 2. App. Rodriguez f/govt and Karahan f/deft. Sentencing 5/26/00 2:00. (ck) [Entry date 03/08/00] [Edit date 09/25/01]

3/6/00 14 ORDER for Disclosure of PSI as to Donald Dee Rapier , PSI completion by 4/18/00 for Donald Dee Rapier , Objection to PSI due 5/2/00 for Donald Dee Rapier , Final PSI due 5/22/00 for Donald Dee Rapier , Sentencing set for 2:00 5/26/00 for Donald Dee Rapier before Judge Nancy F. Atlas (Signed by Judge Nancy F. Atlas), entered. Parties ntfd. (ck) [Entry date 03/08/00] [Edit date 09/25/01]

3/6/00 15 SECOND MOTION by Donald Dee Rapier to Travel outside the district, filed. (ck) [Entry date 03/09/00] [Edit date 09/25/01]

4/7/00 16 THIRD MOTION by Donald Dee Rapier to Travel outside district , filed. (br) [Entry date 04/11/00] [Edit date 09/25/01]

4/12/00 17 ORDER granting [16-1] motion to Travel outside district as to Donald Dee Rapier (1) (Signed by Judge Nancy F. Atlas), entered. Parties ntfd. (ck) [Entry date 04/13/00] [Edit date 09/25/01]

5/8/00 18 STATEMENT of No Objections to Presentence Investigation Report by USA as to Donald Dee Rapier , filed. (pg) [Entry date 05/09/00] [Edit date 09/25/01]

5/8/00 19 MOTION by Donald Dee Rapier to Travel to Austin, Texas , filed. (pg) [Entry date 05/09/00] [Edit date 09/25/01]

5/10/00 20 ORDER granting [19-1] motion to Travel to Austin, Texas as to Donald Dee Rapier (1) (Signed by Judge Nancy F. Atlas), entered. Parties ntfd. (br) [Entry date 05/11/00] [Edit date 09/25/01]

5/19/00 21 OBJECTION by Donald Dee Rapier to Presentence Investigation Report , filed. (br) [Entry date 05/22/00] [Edit date 09/25/01]

5/23/00 22 NOTICE of Sentence Enhancement by USA as to Donald Dee Rapier , filed. (br) [Entry date 05/24/00] [Edit date 09/25/01]

5/24/00 23 FINAL PRESENTENCE INVESTIGATION REPORT (Sealed) as to Donald Dee Rapier , filed. (pg) [Entry date 05/24/00] [Edit date 09/25/01]

5/24/00 24 SEALED Confidential Sentencing Recommendation regarding Donald Dee Rapier to the Court, filed and placed in vault. (pg) [Entry date 05/24/00] [Edit date 09/25/01]

5/25/00 25 OBJECTION by Donald Dee Rapier to Govt's Notice of Sentence Enhancement, filed. (br) [Entry date 05/25/00] [Edit date 09/25/01]

5/26/00 26 SENTENCING MEMORANDUM by Donald Dee Rapier , filed. (br) [Entry date 05/30/00] [Edit date 09/25/01]

5/26/00 27 Sentencing held before Judge Nancy F. Atlas; Ct Reporter: A. Traylor; Donald Dee Rapier (1) count(s) 1, 2 . Cnts 1&2 60 mos CBOP, to run concurrent 3yrs SRT to run concurrent; $200 SA; Deft. must participate in a mental health program f/sex offenders, Deft. shall not have contact w/children under the age of 18, $6,000 fine on counts 1 & 2 to run concurrent. Court recommends that deft. be placed in the Butner facility. , filed. US Probation Officer: L. Reed; App: J. Karahan f/deft; D. Rodriguez f/USA; Deft. cont's on bond. Deft's objections, Govt's Notice of Inhancement, deft's

objections to Govt's Notice of Inhancement, Deft's sentencing memorandum & addendum are all adoped as a part of this record. (br) [Entry date 06/02/00] [Edit date 09/25/01]

5/26/00 28 Notice of Right to Appeal as to Donald Dee Rapier (signed by Judge Nancy F. Atlas), filed. (br) [Entry date 06/02/00] [Edit date 09/25/01]

6/1/00 29 NOTICE OF APPEAL of sentencing by Donald Dee Rapier (1) count(s) 1, 2 FILING FEE $ Pd RECEIPT # 4500907 , filed. (bwd) [Entry date 06/02/00] [Edit date 09/25/01]

6/1/00 30 Transcript Order Form as to Donald Dee Rapier requesting transcript of sentencing before Judge Atlas on 5/26/00 by Ct Reporter: A Traylor , filed. (pg) [Entry date 06/05/00] [Edit date 09/25/01]

6/2/00 -- Notice of appeal and Copy of docket as to Donald Dee Rapier to USCA: [29-1] appeal . Parties ntfd. (bwd) [Entry date 06/02/00] [Edit date 09/25/01]

6/2/00 31 JUDGMENT as to Donald Dee Rapier (1) count(s) 1, 2 (Signed by Judge Nancy F. Atlas), entered. Parties ntfd. (br) [Entry date 06/06/00] [Edit date 09/25/01]

6/12/00 32 Transcript Order Form as to Donald Dee Rapier requesting transcript of Rearraignment before Judge Atlas on 3/6/00 by Ct Reporter: Reed, filed. (ck) [Entry date 06/14/00] [Edit date 09/25/01]

6/15/00 33 ORDER to Surrender for Donald Dee Rapier on 6/30/00 at 2:00 at FCI Butner Butner, NC (Signed by Judge Nancy F. Atlas) , entered. Parties ntfd. (br) [Entry date 06/16/00] [Edit date 09/25/01]

7/10/00 34 Judgment Returned Executed as to Donald Dee Rapier ; on 6/30/00 to serve sentence at Butner, NC, filed. (br) [Entry date 07/11/00] [Edit date 09/25/01]

7/17/00 35 Judgment Returned Executed as to Donald Dee Rapier ; on 6/30/00 to serve sentence at FCI Butner, filed. (pg) [Entry date 07/17/00] [Edit date 09/25/01]

7/19/00 36 TRANSCRIPT as to Donald Dee Rapier Re: [29-1] appeal Re-Arraignment Hearing for dates of 3/6/00 before Judge Atlas , filed. Ct Reporter: E. Reed (br) [Entry date 07/20/00] [Edit date 09/25/01]

7/25/00 -- USCA Case Number as to Donald Dee Rapier Re: [29-1] appeal USCA NUMBER: 00-20514 (mhm) [Entry date 07/25/00] [Edit date 09/25/01]

8/9/00 37 ORDER to Disburse Bond as to Donald Dee Rapier (Signed by Judge Nancy F. Atlas), entered. In the Amount of $ 2,500.00 to Depositor: Ronald Rapier 6435 Ladera Drive Houston, TX 77083. Parties ntfd. (br) [Entry date 08/10/00] [Edit date 09/25/01]

9/22/00 38 TRANSCRIPT as to Donald Dee Rapier Re: [29-1] appeal Re-Arraignment & Sentencing Hearing for dates of 5/26/00 before Judge Atlas , filed. Ct Reporter: A. Traylor (br) [Entry date 09/26/00] [Edit date 09/25/01]

10/10/00 -- Certified and transmitted record on appeal consisting of 1 Vol - Original Record, 2 Vols - Transcript & 2 Sealed Instrs. (#23 & 24) to U.S. Court of Appeals as to Donald Dee Rapier:[29-1]

appeal. Circuit No. 00-20514. Parties ntfd. (bwd) [Entry date 10/10/00] [Edit date 09/25/01]

12/11/00 39 Certified copy of Clerk's Office Order by Fifth Circuit Court of Appeals as to Donald Dee Rapier ; terminating [29-1] appeal; the appeal is dismissed as of Dec 5, 2000 for want of prosecution for failure to timely file appellant's brief and record excerpts, filed. [U.S.C.A. No. 00-20514] (pj) [Entry date 12/13/00] [Edit date 09/25/01]

2/15/01 -- Record on Appeal as to Donald Dee Rapier returned from U.S. Court of Appeals: CCA No. 00-20514 Rec'd 1 vol of record, 2 vol of transcripts, 2 sealed envelopes, file reass'd fwd to fileroom. (mhm) [Entry date 02/15/01] [Edit date 09/25/01]

9/14/01 40 ORDER from U.S.C.A. reinstating [29-1] appeal as to Donald Dee Rapier; Donald Dee Rapier (1) count(s) 1, 2, filed. (USCA # 00-20514) (bwd) [Entry date 09/14/01] [Edit date 09/25/01]

10/2/01 -- Certified and transmitted record on appeal consisting of 1 Vol - Original Record, 2 Vols - Transcript & 2 Sealed Instrs. (#23 & 24) to U.S. Court of Appeals as to Donald Dee Rapier:[29-1] appeal. Circuit No. 00-20514. Parties ntfd. (bwd) [Entry date 10/02/01]

Case Flags:
APPEAL
CLOSED

END OF DOCKET: 4:00cr76-0

APPENDIX F

DOCKET SHEETS
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

General Docket
US Court of Appeals for the Fifth Circuit
Court of Appeals Docket #: 00-20514
Filed: 6/19/00
Nsuit: 0
USA v. Rapier
Appeal from: Southern District of Texas, Houston

- -

Lower court information:

District: 0541-4 : H-00-CR-76-ALL
Ordering Judge: Nancy F Atlas, US District Judge
Court Reporter: Tape - SR, Sheila Roque
Court Reporter: Anne Traylor, U S Court Reporter
Court Reporter: Edward L Reed, US Court Reporter
Date Filed: 2/14/00
Date order/judgment: 6/6/00
Date NOA filed: 6/1/00

- -

Fee status: Paid

- -

Prior cases:
None
Current cases:
None

00-20514 USA v. Rapier

UNITED STATES OF AMERICA
Plaintiff - Appellee

Kathlyn Giannaula Snyder,

Assistant US Attorney
FAX 713-718-3302
713-567-9102
[COR LD NTC gvt]
US Attorney's Office
Southern District of Texas
910 Travis Street, Suite 1500
PO Box 61129
Houston, TX 77208-1129

v.

DONALD DEE RAPIER
aka
Donald D Rapier
Defendant - Appellant

Donald Dee Rapier
#88096-079
Federal Correctional
Institution
Butner - Medium
PO Box 1000
Butner, NC 27509-1000

00-20514 USA v. Rapier

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

00-20514 USA v. Rapier

6/19/00 Direct criminal case docketed. NOA filed by Appellant Donald Lee Rapier. [00-20514] (trm)

6/22/00 Transcript order received from Appellant Donald Lee Rapier for Court Reporter Anne Traylor. Date of Hearing: 05/26/00 - Sentencing. [00-20514] Ct. Reporter Acknowledgment due on 7/7/00 for Anne Traylor. (nfd)

6/22/00 Transcript order acknowledgment received from Court Reporter Anne Traylor. Estimated pages: 20 Date Financial Arrangements Made: 06/12/00 [00-20514] Ct. Reporter Acknowledgement ddl satisfied. Transcript due on 8/14/00 for Anne Traylor. Ct. Reporter Discount Date is 8/14/00 for Anne Traylor. (nfd)

7/21/00 Transcript order received from Appellant Donald Lee Rapier for Ed Reed. Date of Hearing: 03/06/00 - Rearraignment. [00-20514] Ct. Reporter Acknowledgment due on 8/7/00 for Edward L Reed. (nfd)

7/21/00 Notice received from Court Reporter Edward L Reed that transcript is awaiting final payment. [00-20514] Financial Arrangements due on 8/7/00 for Donald Lee Rapier. (nfd)

7/21/00 Dismissal notice issued to Appellant Donald Lee Rapier for failure to pay final payment w/ Court Reporter, Ed Reed. [1828855-1] DIS-1 Remedy due on 8/7/00 for Donald Lee Rapier [00-20514] (nfd)

7/21/00 Transcript order acknowledgment received from Court Reporter Edward L Reed. Date Financial Arrangements Made: 7/19/00 [00-20514] Financial Arrangements ddl satisfied. DIS-1 Remedy ddl satisfied. (ccb)

7/21/00 Transcript filed in district court by Court Reporter Edward L Reed on 7/19/00. [00-20514] Ct. Reporter Acknowledgment ddl canceled. (ccb)

8/25/00 Notice received from Court Reporter Anne Traylor that transcript is awaiting final payment. [00-20514] Financial Arrangements due on 9/12/00 for Donald Lee Rapier. (ccb)

8/28/00 Dismissal notice issued to Appellant Donald Lee Rapier for failure to make final payment w/ Court reporter, Anne Traylor. [1862259-1] DIS-1 Remedy due on 9/12/00 for Donald Lee Rapier. [00-20514] (ccb)

9/22/00 Transcript order acknowledgment received from Court Reporter Anne Traylor. Date Financial Arrangements Made: 09/22/00 [00-20514] Financial Arrangements ddl satisfied. DIS-1 Remedy ddl satisfied. (nfd)

9/27/00 Transcript filed in district court by Court Reporter Anne Traylor on 09/22/00. [00-20514] Transcript ddl satisfied. Ct. Reporter Discount Date canceled. ROA due on 10/10/00. (nfd)

10/13/00 Record on appeal filed. Vol(s) of Pleadings: 1 Vol(s) of Transcripts: 2 SEALED: 1 env (PSI, Objections & Recommendation). [00-20514] ROA ddl satisfied. (keg)

10/20/00 Briefing notice issued. [00-20514] A/Pet's Brief due on 11/29/00 for Donald Lee Rapier. (keg)

12/5/00 CLERK Order filed dismissing appeal pursuant to Local Rule 42 (Appellant's failure to file brief and record excerpts) [3074106-1] Copies to all counsel. [00-20514] (nfd)

1/23/01 Motion filed by Appellant Donald Lee Rapier to reinstate appeal [3122138-1], reset the deadline for filing the Appellant's brief [3122138-2]. Default Remedied? (Y/N): N (Awaiting record excerpts) Response/Opposition due on 2/8/01. Excess Pages? (Y/N) N [00-20514] (mcs)

2/13/01 Record on appeal returned to USDC. Volumes: 3 SEALED: 1 env - PSI. [00-20514] (tdc)

9/6/01 CLERK Order filed granting appellant's motion to reinstate case [3122138-1] Copies to all counsel. [00-20514] (pac)

9/6/01 Case reopened. [00-20514] (pac)

9/6/01 Appellant's Brief filed by Appellant Donald Lee Rapier. Copies of brief: 4 # of pages: 12. Disk Provided [Y/N]: N. Date of COS: 8/1/01 Sufficient

[Y/N]: N. Not enough copies of brief; missing certificate of interested parties & summary of argument; argument must be labeled. [00-20514] Sufficient Brief due on 9/24/01 for Donald Lee Rapier. (keg)

9/6/01 Record excerpts filed by Appellant Donald Lee Rapier # of copies: 4 Sufficient [Y/N]: N. Missing table of contents, certificate of service & tabs. [00-20514] Sufficient Record Excerpts due on 9/24/01 for Donald Lee Rapier (keg)

9/6/01 Declared moot is the motion establishing briefing notice [3122138-2] by Appellant Donald Dee Rapier [00-20514] (ams)

9/14/01 Record requested from district court. [00-20514] ROA due on 10/1/01. (pac)

10/10/01 Record on appeal released to attorney James Lee Turner for Appellee USA. Volumes: 3. [00-20514] (sdh)

10/31/01 Brief made sufficient by Appellant Donald Dee Rapier Replacement Disk Provided [Y/N]: N [00-20514] Sufficient Brief ddl satisfied. (sep)

10/31/01 Record Excerpts made sufficient by Appellant Donald Dee Rapier [00-20514] Sufficient Record Excerpts ddl satisfied. (sep)

11/13/01 Record on appeal returned to 5CCA. Volumes: 3 [00-20514] (kgc)

11/13/01 Appellee's Brief filed by Appellee USA. Copies of Brief: 7 # of pages: 28. Disk Provided [Y/N]: Y. Date of COS: 11/9/01 Sufficient [Y/N]: Y. [00-20514] E/Res's Brief ddl satisfied. Reply Brief due on 11/27/01 for Donald Dee Rapier. (kgc)

11/14/01 Appearance form filed by Kathlyn Giannaula Snyder for Appellee USA. [00-20514] (pac)

11/15/01 The attorney James Lee Turner for USA not participating in case. [00-20514] (ccb)

12/3/01 Briefing Complete. [00-20514] Reply brief ddl canceled. (jmw)

1/24/02 Opinion filed. Issue Mandate due on 2/14/02. [00-20514] (rmf)

1/24/02 Judgment entered and filed. [00-20514] (rmf)

2/15/02 Mandate issued. Approved BOC Issued (Y/N)?: n [00-20514] Issue Mandate ddl satisfied. (sdh)

2/15/02 Record on appeal returned to USDC. Volumes: 3 SEALED: 1 env. [00-20514] (sdh)

6/4/02 Supreme Court notice that petition for certiorari was filed on 04/15/02 by Appellant Donald Dee Rapier. Supct No.: 01-1731 [00-20514] (cav)

10/15/02 Supreme Court order received granting petition certiorari [3714613-1] by Appellant Donald Dee Rapier on 10/07/02. [00-20514] (cav)

10/15/02 Supreme Court opinion (dated 10/7/02) filed. [00-20514] Supreme Court Judgment due on 11/14/02. (ams)

11/12/02 Supreme Court judgment filed. [00-20514] Supreme Court Judgment ddl satisfied. (ams)

12/19/02 Supplemental brief(s) requested of Appellant Donald Dee Rapier, Appellee USA for addressing the applicability to Ashcroft v. Free Speech Coalition. A Sup br due: 1/15/03 E Sup br due: 1/15/03 [00-20514] A/Pet Supplemental Brief due on 1/15/03 for Donald Dee Rapier. E/Res Supplemental Brief due on 1/15/03 for USA. (ams)

12/30/02 Motion for summary remand to district court filed by Appellant Donald Dee Rapier TREATED AS letter brief. Copies of Brief: 4. Disk Provided [Y/N]: n Date of COS: 12/23/02 [00-20514] A/Pet Supplemental Brief ddl satisfied. (ams)

1/3/03 Case reopened in light of supplemental briefing being requested. [00-20514] (ams)

1/3/03 Supplemental Letter brief filed by Appellee USA Copies of Brief: 7 # of pages: 5. Disk Provided [Y/N]: n Date of COS: 1/2/02 Sufficient [y/n]: n Missing disk. [00-20514] E/Res Supplemental Brief ddl satisfied. Sufficient Brief due on 1/13/03 for USA. (rsm)

1/14/03 Response to Government Opposition to Motion for Summary Remand to District Court TREATED as Supplemental reply brief filed by Appellant Donald

Dee Rapier Copies of Brief: 4 # of pages: 3 Date of COS: no date Disk Provided [Y/N]: n Sufficient [Y/N]: n, COS not dated. [4071642-1] [00-20514] [00-20514] (ams)

1/17/03 Brief made sufficient by Appellee USA Replacement Disk Provided [Y/N]: y [00-20514] Sufficient Brief ddl satisfied. (rsm)

2/28/03 Supplemental authorities (FRAP 28(j)) filed by Appellant Donald Dee Rapier [4116581-1]. [00-20514] (rjd)

3/14/03 Record on appeal returned to 5CCA. Volumes: 3 SEALED: 2 PSI [00-20514] (jma)

3/17/03 Record on appeal returned to USDC. Volumes: 3 Exhibits: 2 PSI. [00-20514] (jma)

3/17/03 Opinion order filed to close case On Remand From the Supreme Court of the United States. (ISSUED AS AND FOR THE MANDATE) [4129686-1] [00-20514] (jma)

3/17/03 Mandate issued. Approved BOC Issued (Y/N)?: n [00-20514] (jma)

APPENDIX G

INDICTMENT
DATED 2-14-00

FILED: 2-14-00
MICHAEL M. MILBY,
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
CRIMINAL No. H-00-76

UNITED STATES OF AMERICA	§
V.	§
DONALD DEE RAPIER	§
a/k/a DONALD D. RAPIER	§

INDICTMENT

THE GRAND JURY CHARGES THAT:

INTRODUCTION

At all times material to Counts One and Two of this Indictment:

1. The term "minor" is defined, pursuant to Title 18, United States Code, Section 2256(l), as "any person under the age of eighteen years."

2. The term "sexually explicit conduct" is defined, pursuant to Title 18, United States Code, Section 2256(2), as any:

> actual or simulated -
> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; [or]
> (B) bestiality; [or]
> (C) masturbation; [or]
> (D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person.

3. The term "visual depiction" is defined, pursuant to Title 18, United States Code, Section 2256(5), as any:

> "undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;"

The term "computer" is defined, pursuant to Title 18, United States Code, Sections 2256(6) and 1030(e)(1), as any:

> "electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or [data] storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device;-

5. The term "child pornography" is defined, pursuant to Title 18, United States Code, Section 2256(8), as any:

"any visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where -

> (A) the production of such visual depiction involves the use of a minor engaged in sexually explicit conduct;
> (B) such visual depiction is, or appears to be of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging -in sexually explicit conduct;"

COUNT ONE

[18 U.S.C. §§ 2252A(a)(l) and 2256]

1. Paragraphs 1 through 5 of the Introduction to this Indictment are incorporated herein by reference as though fully set forth herein.

2. On or about July 4, 1999, within the Houston Division of the Southern District of Texas,

DONALD DEE RAPIER,

defendant herein, did knowingly transport in interstate and foreign commerce by any means, including by computer, child pornography.

In violation of Title 18, United States Code, Sections 2252A(a)(1) and 2256.

COUNT TWO

[18 U.S.C. §§ 2252A(a)(5)(B) and 2256]

1. Paragraphs 1 through 5 of the Introduction to this Indictment are, incorporated herein by reference as though fully set forth herein.

2. On or about July 4, 1999, within the Houston Division of the Southern District of Texas,

DONALD DEE RAPIER,

defendant herein, did knowingly possess a computer and other material that contained an image of child pornography

that had been mailed, shipped, and transported in interstate and foreign commerce by any means, including by computer; and which was produced using materials that have been mailed, shipped, and transported in interstate and foreign commerce by any means, including by computer.

In violation of Title 18, United States Code, Sections 2252A(a)(5)(B) and 2256.

A-TRUE BILL:

/SS/ _____.

FOREPERSON OF THE GRAND JURY

MERVYN M. MOSBACKER
United States Attorney

/SS/ _____.

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